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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 463

THE BALTIMORE AND OHIO RAILROAD COMPANY, A CORPORATION; THE NEW YORK CENTRAL RAILROAD COMPANY, A CORPORATION; AND THE PENNSYLVANIA RAILROAD COMPANY, A CORPORATION,
Petitioners,

vs.

GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, DEBTOR; FRANK A. THOMPSON, TRUSTEE, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, DEBTOR; AND BERRYMAN HENWOOD, TRUSTEE, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, DEBTOR,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners respectfully pray that a review of the judgment of the United States Circuit Court of Appeals for the Eighth Circuit on writ of certiorari be granted, and, in support of their petition, allege:

Statement of the Matter Involved.

This action, brought under the Federal Declaratory Judgments Act, involves the ownership and distribution of sums paid by the Government for the transportation of Government freight over two or more connecting railroads, pursuant to the terms of those roads' individual land grant equalization agreements with the Government. It is the first case arising in this field of the railroad business to come before the courts, and it is not possible to make an informative statement of the matter as concise as petitioners would prefer.

Petitioners, sometimes referred to as the Central roads, operate railroads in Central Freight Association Territory which lies east of the Mississippi River and north of the Ohio River. Respondents operate railroads in Southwestern Freight Bureau Territory west of the Mississippi River.

Railroads constructed with the aid of Government land grants are required by statute[1] to handle Government freight over actual land grant mileage at 50% of the rate which "the public at large" would pay for the same service. In practice, this casts a burden upon every road which competes with an aided road for a share of Government business. The non-land grant road must agree to equalize the land grant deductions available to

[1] "10 U.S.C. § 1375. Charges for transportation by land-grant railroads subject to regulation by Congress. Payment shall be made at such rates as the Secretary of War shall deem just and reasonable and shall not exceed 50 per centum of the full amount of compensation, computed on the basis of the tariff or lower special rates *for like transportation performed for the public at large*, for the transportation of property or troops of the United States over any railroad which under land-grant acts was aided in its construction by a grant of land • • • subject to such regulations as Congress may impose restricting the charge for such Government transportation, and such payment shall be accepted as in full for all demands for such service." 43 Stat. L. 486. All italics in the brief are petitioners'.

the Government over competitive land grant mileage, or it does not receive the business. Petitioners do not operate in Southwestern rate territory, and the respondents do not operate in Central Territory. The two sets of lines interchange the freight at the boundary of the two rate territories, at such points as St. Louis and Cairo, on the Mississippi River.

For many years each of these roads has had a separate, individual land grant equalization agreement with the Government. The Court of Appeals apparently quotes with approval (R. 1796; 155 F. 2d 767, 771) the following statement in the opinion of the District Court:

> "Land grant agreements are contracts between the individual carrier and the Government. They are purely voluntary and subject to such terms only as the contracting parties agree upon. Plaintiffs have no lawful right to control in any manner defendants' land grant agreements with the Government. Defendants have no lawful right to control in any manner plaintiffs' land grant agreements with the Government. They are subject to cancellation by the parties to them without interference from any other carrier." (R. 1675; 59 F. Supp. 21, 23.)

There has never been an agreement between petitioners and respondents respecting the ownership or distribution of land grant revenues. Until the filing of the complaint herein, it had always been recognized by all the parties to this cause that the revenue to be received by each road was governed solely by the terms of that road's individual equalization agreement with the Government. The dispute arose over the construction of the several agreements. The District Court found:

> "For over thirty years each of the parties to this case, regardless of which were the collecting or settling carrier, carried the land grant deduction in the territory served by it. In 1934 the defendants made some

> changes in their land grant agreements with the Government. *Basing its action on these changes in land grant agreements by the defendants with the Government,* two of the plaintiffs (Missouri Pacific Lines and St. Louis Southwestern Railway) thereupon commenced to pass on to the eastern lines part of the land grant deductions made on the western lines, in cases where they were the collecting carrier."[1] (R. 1664; 159 F. Supp. 21, 25.)

It will be seen that the very origin of this controversy emphasizes respondents' reliance upon the terms of the equalization agreements as governing the ownership of the revenue derived from such agreements. (R. 238, 239, 242.) The District Court found further that respondents continued to justify their position in the dispute neither on the ground of a contract between the roads themselves, nor on the absence of such a contract, "but on the land grant agreement of the defendants [petitioners]." (R. 1698; 59 F. Supp. 21, 42.)

The several equalization agreements between petitioners and the Government plainly limit the land grant deductions equalized by each of them, to the deductions arising out of land grant mileage in Central rate territory in which those lines operate, the territory lying east and north of the gateways where the freight is interchanged between petitioner and respondent lines. The limiting provision, common to each of the petitioners' equalization agreements, is as follows:

> "The participation of this carrier in rates derived through land-grant deductions is subject to the limitation that this carrier will participate only in deductions for the land-grant mileages within Central Freight Association territory of the lines of railroad

[1] When Government freight is transported over more than one line, the Government, for convenience, sends the aggregate amount of the charges accruing under the several equalization agreements, to the terminating road, which has the duty to remit, on the proper basis, to all roads participating in the transportation.

in the southern peninsula of Michigan and of the Illinois Central within Illinois between Chicago and Cairo and between Minonk and Centralia, both inclusive." (Ex. D-2, par. 3(c), R. 1252; Ex. E-2, par. 3(d), R. 1255; Ex. F-2, par. 3(d), R. 1259.)[1]

A few weeks before the bringing of this suit counsel for one of the respondents conceived the idea of attempting to defeat that provision by contending that the respective traffic officers of the two groups of roads had entered into a contract to distribute the revenue from Government freight on the same basis as the revenue accruing from joint rates, and without regard to the location or amount of the land grant mileage in the respective rate territory, or the terms and conditions of the several equalization agreements. It was contended that the alleged contract between the parties overrode and nullified the limiting terms of petitioners' individual equalization agreements with the Government, and required petitioners to bear, not only all the land grant deductions in their own (Central) rate territory, but also to bear a part of the deductions arising out of land grant mileage in Southwestern Territory which is competitive with respondents. The District Court said:

> "Specifically it is this transfer, from west to east, of land grant deductions that is the crux of this case." (R. 1665; 59 F. Supp. 21, 26.)

By their answer, petitioners denied the making of the alleged contract, and asked the Court to resolve the controversy by requiring that in the distribution of the revenues the respondent roads observe the equalization agreements as they had done for thirty years, and as they claimed they were doing for forty years, the entire

[1] For convenient reference, the presently effective equalization agreements of The Baltimore and Ohio Railroad Company, and of the Missouri Pacific Railroad Company, which are typical, respectively, of those of petitioners and respondents, are attached to the supporting brief as Appendix A.

life span of such agreements. The existence or nonexistence of the alleged contract between the roads was the sole issue in the District Court because it was the sole ground on which respondents sought to defend their action in forcing petitioners to bear deductions in addition to those specified in their equalization agreements. In an extensive opinion based on evidence taken at a long trial, including the testimony of many witnesses, the trial court held that the alleged contract by which respondents sought to defeat the terms of the equalization agreements had never been made, and required that the revenues be distributed in accordance with the terms of the several equalization agreements, namely on the basis of each road bearing the deductions accruing in its own territory.

It was not disputed, and the District Court found, that for the transportation of the freight across Central Territory the Government regularly pays to the settling road the amount which would be paid for that service by the public at large, reduced only by the land grant deductions in Central Territory, and similarly, that for the transportation through Southwestern Territory, the Government pays the settling road the amount which would be paid for that service by the public at large, reduced only by the land grant deductions in Southwestern Territory. (R. 1677, 1678; 59 F. Supp. 21, 32-33.)

The District Court held:

> "There is no provision in [petitioners'] defendants' land grant agreements which, on their face, can be construed as a contractual obligation by the defendants to absorb land grant deductions in the territory of the [respondents] plaintiffs or by which land grant rates are converted into joint rates." (R. 1673; 59 F. Supp. 21, 30.)

He stated that respondents and all other roads had recognized this for many years, and that other Southwestern

lines continue to do so now. He held that under the terms of the equalization agreements the sums paid by the Government do not become a joint fund of common ownership in the hands of the settling road to be allocated by agreement between the roads. He held, on the contrary, after reviewing the whole history of equalization agreements, that they are *several* and individual, (R. 1663, 1664) that each road fixes the measure of the compensation it will receive by a general holding out in its agreement, as qualified by various "exceptions" and "conditions," and that the several sums, due the respective roads, "are lumped together in one sum and the revenue sent to the destination or collecting carrier for distribution." (R. 1678.) He held, therefore, that the ownership of the revenue paid by the Government is established by the several equalization agreements and must be distributed accordingly. The District Court thus disposed of the entire controversy.

The Judgment of the Court of Appeals.

The Court of Appeals sustained the holding of the District Court that when the traffic officers of the two groups of roads formulated a statement of the divisions of joint rates which had been prescribed by the Interstate Commerce Commission, they had not thereby made a contract governing the ownership and distribution of revenues accruing under equalization agreements. The Court of Appeals said:

> "These findings support the decree denying the relief demanded by the plaintiffs [respondents] and they are abundantly sustained by the evidence. The testimony is voluminous. To review it here would unduly extend this opinion. Further, such a review is unnecessary because the trial court has set it out at length in its opinion." (R. 1794; 155 F. 2d 767, 771.)

Further, the Court of Appeals agreed that:

> "These contracts [land grant equalization agreements] are entered into voluntarily by the railroads;

> and they may, in so far as the government is concerned, contain such conditions, restrictions and limitations as the railroads filing them desire to impose." (R. 1791; 155 F. 2d 767, 769.)

Nevertheless, the Court of Appeals denied any effect to the "conditions, restrictions and limitations" in petitioners' equalization agreements, holding that the District Court "exceeded its jurisdiction" (R. 1795) in requiring that the terms of the equalization agreements be observed, and thus resolving the entire controversy. The court said:

> "Clearly, it seems to us, the Agreement [petitioners' equalization] read as a whole means that defendants [petitioners] will accept and receive shipments for the government *at the lowest net rates available, but that for through traffic over connecting lines from or to points outside of Central Freight Association Territory they will divide the revenues only on the territorial basis.*"[1] (R. 1798; 155 F. 2d 767, 772.)

The statement last quoted reveals, we believe, the basic error of the Court of Appeals. The very provision[2] which is the heart of petitioners' equalization agreements because it identifies the land grant deductions which petitioner will "equalize", or allow to the Government, would be rendered utterly ineffectual and meaningless by that court's modification of the District Court's decree:

> (1) This vital "exception"[2] is given no effect so far as the Government is concerned. Its plain purpose and meaning is to limit and qualify the equalizing road's holding out to carry at "the lowest net rates

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[1] For convenience the term "territorial basis" was used throughout the case to mean a distribution of the sums paid by the Government under the equalization agreements on the basis of each line bearing the deductions in its own territory.

[2] "*The participation of this carrier* in rates derived through land-grant deductions *is subject to the limitation* that this carrier will participate only in deductions for the land-grant mileages within Central Freight Association territory of the lines of railroad in the southern peninsula of Michigan and of the Illinois Central within Illinois between Chicago and Cairo and between Minonk and Centralia, both inclusive." (Ex. D-2, par. 3(c), R. 1252; Ex. E-2, par. 3(d), R. 1255; Ex. F-2, par. 3(d), R. 1259.)

lawfully available." But in spite of the exception, it is said that the petitioners agreed with the Government to handle the traffic "*at the lowest rates available.*"

(2) The provision is held meaningless, also, so far as connecting railroads are concerned because it is characterized as a "divisional formula" which one carrier cannot make "binding upon another carrier without the other carrier's consent." (R. 1796; 155 F. 2d 767, 772.)

The "exceptions" and "conditions" which have been used by every equalizing carrier from the beginning to limit and define what is equalized, and thereby to measure the reduced charge accorded the Government, are thus rendered completely ineffectual for any purpose.

The Court of Appeals concluded:

"The decree makes this divisional formula binding upon the plaintiffs who are not parties to it." (R. 1798; 155 F. 2d 767, 772.)

• • • • •

"While we conclude that the court rightly denied to the plaintiffs the relief demanded in their petition, we are also of the opinion that it exceeded its jurisdiction in granting to the defendants the injunctive relief demanded by them." (R. 1795; 155 F. 2d 767, 771.)

The judgment of the Court of Appeals that the District Court was without power to determine this controversy was based upon the belief, which we believe to be erroneous, that the principle stated by this Court in *The Terminal R. R. Association case, infra,* controls the issue here. Although it held that reduced charges accorded the Government through individual equalization agreements are not joint rates, but are of an entirely different character, the Court of Appeals said:

"In *Terminal R. R. Association, et al.* v. *United States, et al.,* 266 U. S. 17, 30, the Supreme Court

said: 'The making of rates is a legislative and not a judicial function (citations). The division of *joint rates is also legislative in character.*' " (R. 1795; 155 F. 2d 767, 771.)

• • • • •

"Neither can one carrier by inserting conditions and restrictions in its equalizing land grant contract with the government make such restrictions binding upon another carrier without the other carrier's consent." (R. 1796; 155 F. 2d 767, 772.)

• • • • •

"Divisions of land grant rates to be earned in the future can be settled only by contract between the participating carriers. Division of revenues so earned in the past can be settled only by agreement or by a proper suit in equity." (R. 1798; 155 F. 2d 767, 772.)

Both sides asked the District Court to resolve this controversy by granting declaratory and injunctive relief, and all the evidence germane to the issue was offered and received. Respondents' contention was that the equalization agreements were no longer controlling because of an alleged contract between the roads establishing the ownership of the revenues on a different basis; petitioners contended that no such contract had been made and that the equalization agreements still governed the ownership and distribution of the revenue.

The District Court found, and the Court of Appeals agreed, that the evidence proved that the contract alleged by respondents had not been made. Further, the evidence proved without dispute, as stated in the opinion of the District Court, that for more than a generation both these groups of carriers had recognized that their respective equalization agreements governed the settlements between them, and that the agreements did not require either group of roads to bear deductions accruing

in the territory of the other group. (R. 1664; 59 F. Supp. 21, 25.) The evidence proved that the equalization agreement of every road is in such terms, and so qualified, that an agreement carrier never absorbs any land grant deductions without its full and complete consent, and that it is unnecessary for two or more equalizing carriers to enter into a further agreement between themselves in regard to the allocation of such deductions. The evidence proved that by the terms of their respective equalization agreements each of the respondent roads has agreed with the Government to accept the sums which are left in its hands after settling with the Central roads on the basis required by the decree of the District Court; it proved that the sums thus remaining to the respondent roads constitute the full amount paid by the public at large for the transportation service over those lines, reduced only by land grant deductions in their own territory. The evidence proved that at the suggestion of the Government each of the respondents amended its own equalization agreement with the Government in response to, and contemporaneously with, the making of petitioners' equalization agreements with the Government. (R. 124-129; 292-294; 350-355.)

Without discussion, and apparently without any consideration of this evidence, and presumably on the theory that as a matter of law the equalization agreements create a common fund of undivided ownership, the Court of Appeals vacated the action of the District Court resolving the entire controversy and remitted the parties to a "proper suit in equity." (R. 1798.)

Basis of Jurisdiction.

The decree of the Circuit Court of Appeals sought to be reviewed was entered on June 10, 1946. Petitioners' motion for reconsideration was denied July 26, 1946, one judge voting to grant the motion. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347). There are special and important reasons, as set forth in this petition, why the cause should be reviewed by this Court.

Questions Presented.

1. Does the United States District Court have jurisdiction to grant injunctive relief in an action based upon the Federal Declaratory Judgments Act, Judicial Code, Section 274(d), 28 U.S.C. Section 400, when necessary to put an end to the controversy in one proceeding, rather than to require the parties to bring two or more actions involving the same subject matter and governed by the same evidence?

2. Do the several land grant equalization agreements between petitioners and the United States govern the revenue to be received by each road participating in the transportation of the freight, or are petitioners obliged to negotiate an agreement with respondents before they can secure the amounts actually paid by the United States for the respective transportation services performed by them?

3. Is the distribution of the land grant revenue which accrues under the several, separate equalization agreements between the individual roads and the United States, governed by the terms of such several agreements, with the result that the terminating or settling road receives

certain specific sums which are owned by its connecting roads, and not a single fund of common ownership in which all participating roads have an undivided interest?

4. Does the mere form or method of settling for the transportation of Government freight under which the net amounts due the several roads "are lumped together in one sum and the revenue sent to the destination or collecting carrier for distribution," (Opinion of the District Court, R. 1678) convert the several separate increments so paid by the Government into a fund of common ownership in which each participating line has an undivided interest?

5. After apparently recognizing that each road has the right to agree with the Government as to the reduced rate basis on which that road will handle land grant traffic, did the Court of Appeals then erroneously nullify that conclusion by ruling that when the Government pays the charges due under each of the several equalization agreements, petitioners may obtain the revenue so earned, and paid by the Government, only through the consent of the terminating line, and that the District Court was without jurisdiction to resolve the controversy by declaring that the terms of the several agreements governed and must be observed in the distribution of the revenue?

6. Did the United States District Court have the jurisdiction and the power, if not the duty, to construe and determine the effect of the individual equalization agreements of the petitioners and respondents and to require by means of declaratory and injunctive relief that such agreements be observed?

7. Did the Court of Appeals err in vacating such declaratory and injunctive relief on the ground that it was beyond the jurisdiction of the District Court, without any consideration of undisputed evidence showing that for

forty years respondents had recognized and insisted that the distribution of land grant revenues is governed by the terms of the several equalization agreements, and, because of this, that by agreement with the Government each of the respondents had deliberately amended its own equalization agreement in response to and contemporaneously with the making of petitioners' equalization agreements?

8. In vacating the decree of the District Court which directed each of the respondents to observe the terms of the several equalization agreements in the distribution of revenues derived from such agreements, and holding that in order to secure the compensation provided in its equalization agreements the Central roads must secure the consent of respondents, did the Court of Appeals err by denying to each of the petitioners its right, under Section 22 of the Interstate Commerce Act (49 U.S.C. Sec. 22), to determine for itself the measure of the reduced charge it would accord the Government?

Reasons Relied On for the Allowance of the Writ.

1. This is the first case presenting a controversy between connecting railroads over the ownership and distribution of sums paid by the Government for the transportation of freight under land grant equalization agreements, and by its decision therein the Court of Appeals has passed on an important question of Federal law which has not been, but should be, determined by this Court.

2. In vacating the order of the District Court which held that the terms of the several equalization agreements governed the ownership of the revenue accruing under such agreements, and that those agreements must be observed by the settling road in the distribution of such revenues, the Court of Appeals denied the right of each of petitioners under Section 22 of the Interstate Commerce

Act (49 U.S.C. Sec. 22) to determine the measure of the reduced charges which it would accord the Government on land grant freight traffic. This involves an important question of Federal law which has not been, but should be, settled by this Court.

3. In setting aside the decree entered by the District Court on authority of the decision of this Court in *Terminal R. R. Association, et al.* v. *United States, et al.*, 266 U. S. 17, 30, the Court of Appeals has misconstrued and misapplied that decision.

4. The evidence of record proves, as the District Court found, that:

(a) there has never been an agreement between these roads overriding the equalization agreements and providing a basis for the allocation of revenues accruing under such agreements;

(b) for forty years every road, party to this cause, recognized that the revenue to be received by each road for the handling of Government freight under an equalization agreement is governed, not by an agreement between the several roads participating in the transportation, but solely by that road's individual equalization agreement with the Government;

(c) the equalization agreement of each of these roads is in such terms, and so qualified by conditions and exceptions, that it never absorbs any land grant deductions, or otherwise suffers a diminution of its revenue on this traffic without its full and complete consent;

(d) each of the respondents amended its own equalization agreement with the Government in response to and contemporaneously with the making of petitioners' agreements with the Government.

The opinion of the Court of Appeals does not contain the slightest reference to any of the evidence referred to in

paragraphs (b), (c) and (d) above, and it is apparent that it was given no consideration. It is submitted that the evidence sustains the decree of the District Court finally disposing of this controversy, and that the order setting aside the declaratory and injunctive relief granted petitioners creates such a gross injustice, and is so mistaken in law, as to require the exercise of the supervisory power of this Court.

5. In holding that the District Court was without jurisdiction to end this controversy by granting injunctive relief, and that petitioners must now resort to a suit in equity, despite the fact that the record presents every fact bearing on the issue which either side could adduce in any proceeding, the Court of Appeals decided a question respecting the administration of the Federal Declaratory Judgments Act (Judicial Code, Sec. 274d; 28 U.S.C. Sec. 400), which has not been, but should be, settled by this Court.

6. One of the judges of the Court of Appeals voted to grant petitioners' motion to reconsider that court's action in vacating the declaratory and injunctive relief granted petitioners by the District Court, so that there is some basis for suggesting that the four judges who have participated in the proceeding may be evenly divided on that question.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said court to certify and send to this Court for its review and determination on a day certain to be therein named, the full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 13129—Civil, *Guy A. Thompson, Trustee, Missouri*

Pacific Railroad Company, Debtor; Frank A. Thompson, Trustee, St. Louis-San Francisco Railway Company, Debtor; and Berryman Henwood, Trustee, St. Louis Southwestern Railway Company, Debtor, Appellants v. *The Baltimore and Ohio Railroad Company, a corporation; The New York Central Railroad Company, a corporation; and The Pennsylvania Railroad Company, a corporation, Appellees*, and that said decree of said Circuit Court of Appeals in said case may be modified and reversed by this Court in such respects as the rights of petitioners may require, and that your petitioners may have such other and further relief in the premises as to this Court may seem appropriate and in conformity with the law.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
a corporation,

THE NEW YORK CENTRAL RAILROAD COMPANY,
a corporation,

THE PENNSYLVANIA RAILROAD COMPANY,
a corporation,

By DOUGLAS F. SMITH,
KENNETH F. BURGESS,
ROBERT A. SPRECHER,
WILTON D. CHAPMAN,
E. C. HARTMAN.

Of Counsel:

E. H. BURGESS,
THOMAS P. HEALY,
GUERNSEY ORCUTT,
SIDLEY, AUSTIN, BURGESS & HARPER.

Dated: September 1, 1946.

IN THE

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THE BALTIMORE AND OHIO RAILROAD COMPANY, A CORPORATION; THE NEW YORK CENTRAL RAILROAD COMPANY, A CORPORATION; AND THE PENNSYLVANIA RAILROAD COMPANY, A CORPORATION,
Petitioners,

vs.

GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, DEBTOR; FRANK A. THOMPSON, TRUSTEE, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, DEBTOR; AND BERRYMAN HENWOOD, TRUSTEE, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, DEBTOR,
Respondents.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR CERTIORARI.

The Opinions in the Courts Below.

The opinion of the District Court is reported in 59 F. Supp. 21-49, and appears in the record herein at pages 1659-1731.

The opinion in the Circuit Court of Appeals is reported in 155 F. 2d 767, and appears in the record herein at pages 1788 to 1798.

Petitioners' motion for reconsideration was denied July 26, 1946, one judge voting to grant the motion.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on June 10, 1946. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240(a) of the Judicial Code, as amended (28 U.S.C. Sec. 347).

STATEMENT OF THE CASE.

Petitioners and respondents do not operate in the same territory. They connect and interchange traffic at the Mississippi River. Each has a land grant equalization agreement with the Government. The function of such an agreement is to reduce the charge of the agreeing road in such an amount as to make it "equal" to the charge available to the Government over the land grant mileage with which the equalizing road desires to compete. Respondents admit, and the trial court found, that for thirty years all of the parties interpreted the several equalizing agreements to require petitioners to bear the land grant deductions in Central Territory, and respondents to bear the land grant deductions in Southwestern Territory. (R. 1664.)

This controversy arose out of respondents' action in forcing the Central roads to bear, not only all land grant deductions arising out of the land grant mileage in their own (Central) territory, which petitioners should and do bear, but to bear also a part of the deductions accruing out of land grant mileage located in Southwestern Territory. The District Court described respondents' effort to shift a part of their own competitive land grant burden from the Southwest into Central Territory by transferring it to petitioners, as the crux of the case. (R. 1665; 59 F. Supp. 21, 26.)

When respondents first departed from the long practice of bearing all the deductions in their own territory they claimed to rely upon an alleged change in the meaning of petitioners' equalization agreements. Throughout the period of the dispute, it was the position of all parties that the equalization agreements controlled the settlements,

and the parties differed only in their interpretation of the agreements. To remove any possible basis for this difference, petitioners cancelled their agreements and entered into new agreements with the Government effective January 1, 1944.[1] The language of these agreements stating the deductions equalized by petitioners is too plain to permit any pretense of misconstruction, and a few weeks before this action was commenced respondents sought some means to override the equalization agreements which they had always previously relied upon as controlling the ownership and distribution of the revenue. It was then that counsel for one of the respondents asserted for the first time that several years before, the traffic officers of the two groups of roads had entered into a contract to allocate land grant revenues on the same basis as that prescribed by the Interstate Commerce Commission for the division of "joint rates."[2]

The District Court held that the alleged contract had not been made, and that finding removed the only ground on

[1] The District Court held that the Central roads' 1944 agreements actually had the same meaning as those previously in effect and respondents did not challenge that conclusion in the Circuit Court of Appeals. (Conclusion of Law No. 9, R. 1730; Respondents' points on appeal, R. 1743-1748.)

[2] The Commission, acting under Section 15(6) of the Interstate Commerce Act (49 U.S.C. Sec. 15) prescribed the basis for the division of "joint rates" applying between Central and Southwestern Territories. Both courts below held, and respondents do not contend otherwise, that the "joint rates" which were before the Commission in that proceeding, are the rates applicable on commercial traffic published in the tariffs filed with the Commission and either prescribed by the Commission or made by agreement between the participating roads pursuant to formal "concurrences" filed with the Commission. Both courts below held that charges on Government freight derived through the equalization of land grant deductions are not joint rates, that the Commission had no power or purpose to "divide" the revenue here involved under Section 15(6) of the Act, or otherwise, and had no knowledge of the existence of this controversy or any facts relating thereto.

which respondents had argued that the equalization agreements no longer controlled the ownership and distribution of the revenue. The court then declared the meaning and effect of the equalization agreements, and decreed that they be observed by the settling road in the distribution of the revenue.

The Court of Appeals sustained the District Court in holding that the contract alleged by respondents in an effort to defeat the equalization agreements, had not been made, but denied the jurisdiction of that court to declare the respective rights of the parties in the sums received by the settling road as determined by the several equalization agreements. The Court of Appeals held that petitioners' claim for a distribution of revenue in harmony with the terms of those agreements must be permitted to accrue and made the subject of a "proper suit in equity." (R. 1798; 155 F. 2d, 767, 773.)

Because it was admitted by respondents that the historic practice under the equalization agreements was for each group of roads to bear the competitive deductions in its own rate territory, and because respondents' effort to depart from that practice rested solely on their contention that the parties had entered into a contract establishing a different basis of settlement, the existence or nonexistence of that contract was the issue briefed and argued in the Court of Appeals. The opinion of that court shows that in remitting petitioners to a different proceeding and another court, it did not have in mind the evidence and the considerations which caused the District Court to resolve the entire controversy in this proceeding. Petitioners brought these matters to the attention of the court in a motion for reconsideration which was denied, one judge voting that it be granted. (R. 1867.)

For a full and accurate statement of the facts of the case

we respectfully refer this honorable Court to the opinion of the District Court. (59 F. Supp. 21-49; R. 1659-1731.) Respondents have not questioned a single statement of fact in that exhaustive opinion.

Specification of Errors.

1. The Circuit Court of Appeals denied the right of an equalizing road to determine for itself, through an agreement with the Government, the measure of the reduced charge for which it will transport land grant freight, by holding that the equalizing road can obtain such compensation only by the consent of the settling road which has physical possession of the revenue.

2. The Circuit Court of Appeals misconstrued and misapplied the decision of this Court in *Terminal R. R. Association, et al.* v. *United States, et al.*, 266 U. S. 17, 30.

3. The Circuit Court of Appeals misunderstood and misconstrued the function and the effect of the equalization agreements.

4. The Circuit Court of Appeals ignored the evidence which proves, as the District Court found, that the several equalization agreements govern the ownership and distribution of the revenue which comes into the hands of the respondents as the settling road.

5. The judgment of the Circuit Court of Appeals would defeat petitioners' right under Section 22 of the Interstate Commerce Act (49 U.S.C. Sec. 22) to fix the measure of the reduced charge for which it is willing to transport Government freight.

6. The Circuit Court of Appeals erred in holding that the District Court lacked jurisdiction under the Federal Declaratory Judgments Act to resolve this controversy, and that the parties must now be remitted to further liti-

gation in equity, notwithstanding the fact that both sides asked for a declaratory judgment, and as the basis for a complete determination of the controversy placed in evidence every fact which either side could possibly adduce in this or any other proceeding.

ARGUMENT.

The Fundamental Error of the Court of Appeals Arose Out of Its Belief That the Settling Road Had by Some Means Acquired an Undivided Property Interest in the Revenue Paid by the Government for the Transportation of the Freight Across Central Territory Pursuant to the Several Equalization Agreements Between Petitioners and the Government.

The Court of Appeals treated the revenue which is received for distribution by the settling road as a fund of common ownership, notwithstanding the fact that that road receives the revenue, not through any arrangement or understanding between the roads themselves, because there is no privity between the roads in respect to these transactions, but only because the Government finds it convenient to remit to the terminating road, for distribution, the charges created by the several equalization agreements.

The Court of Appeals sustained the District Court in holding that the charges paid by the Government on land grant traffic do not constitute "joint rates" as that term is used in the Interstate Commerce Act, and in Division Sheet 200-A, alleged by respondents to be a contract governing the ownership of revenues derived from equalization agreements. Nevertheless, that court has held that to "divide" net land grant rates is a legislative function, and in support of that conclusion has relied upon the statement in the *Terminal Railroad Case*, 266 U. S. 17, 30, in which the Supreme Court states:

"The making of rates is a legislative and not a

judicial function. The division of *joint rates* is also legislative in character."

In the paragraph immediately preceding the statement quoted from the *Terminal Case, supra,* (page 30) the Supreme Court said:

> "All rates have been set forth by tariffs; and the divisions of the charges among the participating carriers have been shown *by their division sheets filed with the Interstate Commerce Commission.*"

The rates involved in that case, as the opinion of the Supreme Court states, were joint rates available to the public at large, created by joint action of the carriers and filed as joint rates with the Commission.[1] They were not net rates on Government freight, derived through equalization agreements.

Following its reference to that decision, and in reliance upon it, the Court of Appeals said:

> "The Interstate Commerce Commission is authorized to establish through routes and to fix joint commercial rates and to fix divisions of such rates among carriers. 49 U. S. C. A. § 15(1), (3), (6). But the Congress has not delegated either to the Commission or to the courts power to fix divisions of net land grant rates over equalizing routes. Such divisions can be fixed only by contracts among the participating carriers. These divisions can not be determined by reference to any order of the Commission or of the

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[1] In compliance with paragraph 6 of Section 6 of the Interstate Commerce Act, the Interstate Commerce Commission has formulated its tariff Circular 20-A entitled "Rules to Govern the Construction and Filing of Freight-Rate Publications" (Exhibit W-1, R. 1120-1218 and latest supplement, Exhibit X-1, R. 1219-1236), in which the Commission defines joint rates and joint tariffs as follows:

> "The term 'joint rate,' as used herein, is construed to mean a rate that extends over the lines of two or more carriers and that *is made by arrangement or agreement between such carriers and evidenced by concurrence or power of attorney.*
>
> " 'Joint tariffs' are those which contain 'joint rates.' " (R. 1121.)

> War Department or of the court; and it is conceded by the parties and it was recognized by the court that equalizing, or land grant, agreements do not include contracts between the carriers." (R. 1795-96; 155 F. 2d, 767, 771.)

It is clear that the Court of Appeals did not speak of "dividing" the revenue involved here, merely in the sense of "remitting" or "distributing" the revenue. On the contrary, it spoke of fixing divisions of this revenue as if, and on the theory that, the revenue which is received by the terminal road is a common fund, in every dollar of which, each road has an undivided interest.

There is a fundamental difference between the conditions, and the obligations, under which the terminating line collects and holds the revenue accruing, on the one hand, from "joint rates" applying on commercial traffic and, on the other hand, the revenues accruing under separate equalization agreements in which, and by which, each road has made its own individual arrangement with the Government. Without the benefit of argument or reference to much cognate evidence on the point, the court simply assumed that the same principle applies to these very different transactions. The whole relationship between the carriers and the obligation of the collecting line in the two situations, are entirely unlike, and the application of the principle governing the distribution of revenue accruing from "joint rates" would create a gross miscarriage of justice if applied to land grant revenue.

Originally the Government paid the commercial rate and then made claim upon the respective carriers for the amounts due under the statute or the equalization agreements. In the early equalization agreements it was provided:

> "• • • , that freight under Government bills of

> lading will continue to be way-billed at published rates, but in the final adjustment of accounts, the basis outlined above will be observed." (Exhibits M-1, N-1, P-1, Q-1; R. 1059-1063.)

For convenience the Government now makes settlements in one transaction by paying the freight bill to the delivering carrier. In 18 Comp. Dec. 585, the Comptroller commented upon the present method of payment as follows:

> "In making payment for the said service the proper deductions are made therefrom, whether payment is made directly to the aided line or to a connecting carrier which necessarily receives for the aided line a less sum than its authorized division on commercial business.
>
> "Reduced rates on Government business applying by the land-grant lines would lead to those lines being generally used therefor. Many other roads desiring to participate in the Government business have offered to accept for service over their lines the same net revenue as accrues to land-grant lines. *Such roads are called 'agreement' roads, and payment for services rendered by them are made the same as though the reductions are required by law.*" (p. 586.)

We cannot too strongly emphasize the fact that the basis of the injunction entered by the District Court upon a full consideration and understanding of the evidence before him is that *the sums paid under the individual equalization agreements do not constitute a common or joint fund in which the several carriers have an undivided interest.* On the contrary, and this is the vital point, it is solely by virtue of the mechanical process by which land grant charges are sent to the delivering road for distribution that each of the respondents, in its capacity as the settling road on certain shipments, comes into possession of several identifiable sums of money which belong to the Central roads under the terms of their several respective

agreements with the Government. These several sums represent the amount which the "public at large" would pay for handling the traffic across Central Territory reduced by the land grant deductions which the Central roads have agreed to bear.

We shall endeavor to show that the evidence sustains this construction of the legal effect of the several equalization agreements, and if it does, then clearly there is no common and jointly owned fund to be divided, and, under the Court of Appeals' opinion, no jurisdictional question exists. For the very reason that land grant rates are not "joint rates," as both courts below held, the principles governing the division of revenue derived from "joint rates" are inapplicable, and the District Court had jurisdiction to hold, as it did, that the respondent roads are currently receiving sums from the Government in compensation for the transportation of land grant traffic which belong to, and are received and held in trust for, the Central roads, and the decree of the District Court was that such monies must be paid over to the owner roads as received.

The Ownership of the Sums Paid by the Government Under the Terms of the Carriers' Several Equalization Agreements Is Governed by the Terms of Those Agreements, and This Was Recognized by the Respondents for Forty Years.

BY THE USE OF "EXCEPTIONS" AND "CONDITIONS" INCORPORATED IN ITS EQUALIZATION AGREEMENT EACH NON-LAND GRANT ROAD HAS PLACED WHATEVER LIMITATION IT HAS DESIRED UPON THE DEDUCTIONS BORNE BY IT, AND EXACTLY BY THAT MEANS HAS FIXED THE MEASURE OF THE REDUCED RATE ACCORDED THE GOVERNMENT.

The Court of Appeals modified the decree by eliminating therefrom the declaratory and injunctive relief granted the petitioners, on the ground that "divisions of net land grant rates * * * can be fixed only by contracts among the participating carriers" and, therefore, that one carrier cannot, "by inserting conditions and restrictions in its equalizing land grant contract with the Government make such restrictions binding upon another carrier *without the other carrier's consent.*" (R. 1795-96; 155 F. 2d 767, 771.)

In its opinion the Court of Appeals also states that equalization agreements "are entered into voluntarily by the railroads, and they may, in so far as the Government is concerned, contain such conditions, restrictions and limitations as the railroads filing them desire to impose." While referring to the "conditions, restrictions and limitations" which each road inserts in its individual equalization agreement, the Court of Appeals seemingly did not perceive that the very practical function of such provisions is to consent to, and fix the amount of, the reduced charge which the equalizing road is to receive for its service.

The several land grant equalization agreements of these roads are drawn in such form that each road protects its own revenues by the conditions and exceptions incorporated

in its own equalization agreement, and there is no occasion for an agreement between the roads. The necessary consents of the individual roads are embodied in the several equalization agreements and that is the principle underlying the District Court's decree. The Court will be asked to observe how forcefully this fact is illustrated by the amendments which each of the three respondents made in its own equalization agreement, contemporaneously with and in response to the making of the petitioners' agreements. (R. 124-129; 292-294; 350-355.)

By the terms of the equalization agreements, entered into individually with the United States Government by each of the six roads, parties to this cause, the carrier agrees, "*subject to the conditions and exceptions stated below,* to accept, for the transportation of property shipped for account of the Government * * * the lowest net rates lawfully available, as derived through deductions account of land-grant distance from lawful rates * * * applying from point of origin to destination at time of movement." As stated, that holding out is expressly qualified by numerous "conditions and exceptions". (R. 1251, R. 1254, R. 1257, R. 121, R. 289, R. 347.)

Petitioners' respective agreements are subject to two conditions, consideration of which is vital to an understanding of this case because both conditions apply to traffic "destined to and/or received from points on lines of other carriers"—the fact situation involved in this case. The first of these conditions which appears in the agreement of each of the six roads, reads as follows:

> "a. On traffic destined to and/or received from points on lines of other carriers this agreement will apply only in connection with such carriers as have an agreement of the form stated in paragraph 1 above on file with the Chief of Transportation, War Depart-

ment, Washington, D. C., except as otherwise provided under the heading of 'Exceptions' in paragraph 3 below."[1]

Condition "a" means that an equalization carrier will accept "the lowest net rates * * * applying from point of origin to destination at time of movement" *only* if the traffic is local and handled by it alone. If the traffic is handled by two or more carriers, then condition "a" becomes operative and the equalizing carrier will accept the "lowest net rates" only on the condition that every other carrier participating in the transportation *also* enters into an equalization agreement with the Government fixing the revenue which that connecting road shall receive for the service. Each of the roads here did file such an agreement and incorporated such conditions and exceptions as that road desired to determine and to protect its own revenue.

One of the exceptions incorporated in the equalization agreement of each of the petitioners, is the provision that the carriers' holding out to participate in the transportation of land grant traffic, "is subject to the limitation" that it will only bear deductions arising out of land grant mileage in Central Territory:

> "(c) The participation of this carrier in rates derived through land-grant deductions is subject to the limitation that this carrier will participate only in deductions for the land-grant mileages wthin Central Freight Association territory of the lines of railroad in the southern peninsula of Michigan and of the Illinois Central within Illinois between Chicago and Cairo and between Minonk and Centralia, both inclusive." (R. 1252, 1255, 1259.)

Under that agreement a reduced charge became available to the Government over non-land grant mileage through

[1] B. & O. (R. 1251), N. Y. C. (R. 1254), Penn. (R. 1257), Frisco (R. 121), M. P. (R. 347), St. L. S. W. (R. 289).

Central Territory, only upon the express condition that that provision be observed. It is not disputed that on every shipment the Government does actually pay over to the settling road for the transportation service through Central Territory, the full amount which would be paid for that service by the public at large, reduced only by the land grant deductions accruing in Central Territory.[1]

Each of respondents amended its own equalization agreement with the Government, contemporaneously with, and in response to, the incorporation of the foregoing provision in petitioners' several equalization agreements. One of the conditions which had always been incorporated in the agreement of each of the respondent roads, until waived, as shown below, when the Central roads' present agreements became effective, is as follows:

> "b. On traffic destined to and/or received from points on lines of other carriers this agreement is subject also to the exceptions in the agreements of each individual carrier forming part of the through route of movement, on file with the Chief of Transportation,

[1] The District Court described this process as follows:

> "Under direction of the War Department in arriving at the land grant rate, the first step is to divide the through rate by the commercial division (now Joint Division Sheet No. 200-A) for the purpose of determining the amount of the through rate due the respective carriers. After this is done, on mandate of the War Department, the land grant deductions are made on account of the land grant mileage in the respective territory. Having thus arrived at the net rate after land grant deductions have been made, the respective balances or nets are lumped together in one sum and the revenue sent to the destination or collecting carrier for distribution to the carriers entitled thereto because of their part in the carriage of the Government shipment. This method of making land grant deductions in and of itself lends support to the defendants' method of making division of land grant rates on the territorial basis, * * *." (R. 1677-78; 59 F. Supp. 21, 32.)

War Department, Washington, D. C., *except as may be otherwise provided under the heading of 'Exceptions' in paragraph 3 below.''*

By modifying the application of standard provision "(b)", and by the use of other "exceptions" and "conditions" each equalizing road adjusts its own agreement so as to prevent any unacceptable shrinkage of its own revenue. By the use of this provision, a particular road may adopt as an exception to its own agreement, the exceptions of connecting roads, adding such other exceptions as it desires, so that in the end, and in effect, it authorizes only such deductions from its own revenue as it is willing to grant. When the War Department was notified in the Fall of 1943 that the Central roads were cancelling their existing equalization agreements and were proposing to grant reduced rates on Government freight only upon such terms that the respondents, as the settling roads, could no longer claim the agreements to be ambiguous, the Chief of Transportation advised all other equalizing carriers of the exception embodied in the proposed agreements tendered to the War Department by the Central roads. In a letter dated December 6, 1943, Colonel Williamson, of the Office of Chief of Transportation, said:

"Central Freight Association railroads have transmitted to this office new freight land-grant equalization agreements containing a new exception, as follows:

'The participation of this carrier in rates derived through land-grant deductions is subject to the limitation that this carrier will participate only in deductions for the land-grant mileages within Central Freight Association territory of the lines of railroad in the southern peninsula of Michigan and of the Illinois Central within Illinois between Chicago and Cairo and between Minonk and Centralia, both inclusive.'

The Chesapeake and Ohio, the Norfolk and Western, and the Virginian included special variations of this exception apparently based on territorial considerations peculiar to those lines and not affecting the essence of the new exception for purposes of this letter.

• • • • •

"The standard freight land-grant equalization agreement filed by rail lines carries the following 'Condition (b)':

> '(b) On traffic destined to and/or received from points on lines of other carriers this agreement is subject also to the exceptions in the agreements of each individual carrier forming part of the through route of movement, on file with the Chief of Transportation, War Department, Washington, D. C., except as may be otherwise provided under the heading of "Exceptions" in paragraph 3 below.'

This condition serves, practically, as a safeguard of each line against ex parte action by another line which might affect the proportions of land-grant 'shrinkage' as among various lines in a joint route. Because of 'Condition (b)' the action of the Central Freight Association lines may require a change in the routing practices of this office, field establishments of the Army, and other Government departments shipping freight subject to land-grant deductions, *unless all other lines provide such assurances as will enable equalization to continue in effect in the same manner as heretofore.* It has been decided by this office to solicit these assurances uniformly from all equalizing carriers outside Central Freight Association territory, notwithstanding any special features of their agreements. Accordingly, the following question is asked of your line:

> Will your line waive the provisions of Condition (b) so far as they may concern exceptions restricting equalization in Central Freight Association territory, provided all agreement carriers

in the route of movement, other than Central Freight Association carriers, agree to waive those provisions similarly?

"In the interest of uniformity and conclusiveness, it is requested that your reply be signed by a responsible executive or traffic officer—*and that, if it is affirmative, it not be qualified.* In connection with carriers whose affirmative replies are received by 22 December 1943, the routing practices of the Government need not be disturbed. Replies should be addressed to the Chief of Transportation, War Department, The Pentagon, Washington 25, D. C., attention Traffic Control Division. Telegraphic replies should be confirmed by letter." (R. 124-126; 350-352.)

The attention of the Court is especially directed to the Government's reference above to Condition (b) as the standard condition incorporated in equalization agreements, which *"serves, practically, as a safeguard of each line against ex parte action by another line which might affect the proportions of land-grant 'shrinkage' as among various lines in a joint route."* Nothing could better emphasize the means which are available to every road within the framework of its own equalization agreement to fix the measure of its agreed reductions and thus protect its own revenue. It is precisely because each line controls the measure of the reduced rate accorded the Government by the terms of its own equalization agreement with the Government that there has never at any time been an agreement on the subject between these roads themselves.[1]

It will be noted that respondents were advised by the

[1] Even to this day there has never been a dispute between the Central roads, including the petitioners, and the other principal Southwestern roads over the ownership of the revenue on this traffic. No dispute exists, for example, between the Central roads and such Southwestern roads as the Santa Fe, the Rock Island, the Illinois Central and the Kansas City Southern. Each of these roads has always recognized that its equalization agreement required it to bear the deductions in its own territory.

War Department that if their reply was "affirmative" it must *"not be qualified."* Respondents were presented with the clear choice of removing from their several agreements a condition which might be construed as a limitation upon their agreement to bear all deductions in their own territory, or of refusing to agree, with the result that the freight would be routed by the Government over the routes of other principal roads operating through Southwestern Territory which had always recognized their duty to bear the land grant deductions accruing in that territory. By uniform replies to that communication each of the respondent roads answered Colonel Williamson's question in the affirmative, thus waiving condition "b" in their own agreements effective January 1, 1944, coincident with the effective date of the new agreements of the Central roads. Each of the respondents, after replying in the affirmative, and *"not by way of modification but by way of explanation"*, then stated that it was contending in the case at bar that the Central roads had entered into a contract with respondents establishing a different basis for the distribution of land grant revenue from that embodied in the respective equalization agreements (R. 128-129; 292-294; 353-355), a claim which has now been rejected both by the District Court and by the Circuit Court of Appeals. In short, the only qualification which respondents sought to place on their recognition of the restrictions fully spelled out in the new agreements, was that they wanted to test out in court in this case their reliance on an alleged contract between the roads as a means of defeating the new agreements. They have now done so; both courts below have held against them.

We submit that in this deliberate modification of respondents' equalization agreements, the Court will see the practical operation of the method by which each road

protects its own revenue under these agreements, and also ample evidence of the "consents" of respondents deemed necessary by the Court of Appeals.

It Was the Position of Respondents for Forty Years, as the District Court Held, That the Terms of the Land Grant Equalization Agreements Govern the Ownership of the Revenue Accruing Under the Agreements.

The decree of the District Court declaring that the terms of the several equalization agreements control the ownership of the revenues accruing under such agreements is exactly the position taken by all of the respondents from the time when such agreements first came into existence about 1904, until six weeks before this suit was begun when counsel for one of the roads conceived the idea of contending that the parties had entered into a contract governing the ownership of this revenue. Prior to that time the dispute had to do only with the construction to be placed upon the terms of the equalization agreements which were recognized to be controlling.

The District Court found that for thirty years each of respondents recognized that the several equalization agreements established the ownership of the revenue accruing under such agreements and that the agreements contemplated that each line should assume the deductions in its own territory. (R. 1664; 59 F. Supp. 21, 25.) Accordingly, each road faithfully settled on that basis. The respondent, St. Louis-San Francisco, continued to do so until late in the year 1942, a period of almost forty years. (Opinion of District Court, R. 1664; 59 F. Supp. 21, 25.) It should be understood, moreover, that when respondents departed from that basis of settlement, and began to settle on a basis which forced petitioners to bear part of the land grant deductions accruing in the southwest, respondents

continued to insist until the institution of this suit that the equalization agreements were controlling and that their action was warranted by a proper construction of the agreements. (Opinion of District Court, R. 1697-1698; 59 F. Supp. 21, 41-2; R. 238.)

Respondents repeatedly replied to petitioners' protests over the settlements being made by saying in substance "we are relying on the terms of your equalization agreements—if you do not like the basis on which we are settling you must change your agreements." (R. 1675, 1676, 1698, 1541, 1543, 1317.) This was the historic, practical construction of the equalization agreements by all of the parties and this undisputed fact sustains the decree of the District Court that the equalization agreements are intended to and do determine the ownership of the revenues accruing under the agreements, and that henceforth they must be observed by the settling road in the distribution of the revenue. The long practical construction of the agreements by the parties stands in direct opposition to the view of the Court of Appeals that there must be an agreement between the carriers establishing the ownership of the revenue. There has never been such a contract between these parties in the forty years that they have been engaged in the transportation of this freight.

THE METHOD BY WHICH THESE ROADS HAVE FIXED AND ADJUSTED THEIR REVENUE FROM LAND GRANT TRAFFIC IS NOT BY AGREEMENTS WITH OTHER ROADS PARTICIPATING IN THE TRANSPORTATION, BUT BY CHANGES IN THEIR INDIVIDUAL EQUALIZATION AGREEMENTS WITH THE GOVERNMENT.

It has been pointed out, first, that the structure and terms of the several equalization agreements are so designed as to enable each road to fix the measure of the compensation for which it is willing to handle Government

freight, and to establish the ownership of the net amounts which, as the District Court found, "are lumped together in one sum and the revenue sent to the destination or collecting carrier for distribution." (R. 1678.) Secondly, we have emphasized the fact that in practice that has been the position of each of these roads,—there has never been an agreement between them respecting the ownership of the funds, yet for a generation the revenues were distributed without dispute on the basis of the equalization agreements,—and that when a dispute arose it was because both sides, while insisting that the equalization agreements were controlling, differed as to their interpretation.

Third, the evidence shows that whenever in the past any road desired to change the measure of the compensation to be received by it from this freight it did so, not through any arrangement with other roads, but through a change in its equalization agreement with the Government.

Petitioners' Exhibits J-1 and K-1 (R. 1025-1034) show the changes which each of the respondent roads has made in its equalization agreements with the Government in recent years. It will be observed that each of those roads revised its exceptions some fifteen times in the short period covered by the exhibit, which goes back only to 1927. As late as 1939, each of the respondents filed new equalization agreements changing their conditions and exceptions. (R. 121-3, 289-291, 347-349.) They made no effort to enter into agreements with the Central roads respecting any of these changes because they knew that it was by the terms of their individual equalization agreements that they should fix the measure of their reduced charge, and that changes in their agreements would be controlling and given full effect in the settlements.

Each of the Central roads also changed its agreement many times. A large number of their agreements are em-

braced in this record. (R. 1059-1119, 1237-1259, 1266-1281.) The New York System lines alone "made no less, or filed no less than twelve new agreements with the Government during that period of approximately two years." (R. 701.)

It is clear, we suggest, that each of these roads would not have continued to make changes in its equalization agreements year after year, as it did, if the changes were not recognized to be controlling in the settlements. The ultimate purpose, and indeed the only purpose of every such change was to affect the amount which the Government would pay, and the equalizing road receive, for the service performed by it. How meaningless and how futile it would have been to make these repeated changes in the equalization agreements if in practice the changes did not control the revenue which each line would receive from the settling road, because in no instance were these changes accompanied by agreements between the Central and Southwestern roads themselves. There has never been an agreement between the Central and Southwestern roads of any character in respect to the allocation of land grant revenues, but only the consents embodied in the several equalization agreements and the established practice in respect thereto. We submit, therefore, that the long practice of settling on the basis of the several equalization agreements, as amended over and over again by the individual roads, is the clearest proof that those agreements have been recognized to control the distribution of the revenue, and that each equalizing line consents to the distribution of the revenue on the basis of the terms embodied in the several agreements.

The Decision of the Court of Appeals Erroneously Denies: (1) the Right of a Non-Land Grant Road to Determine for Itself the Measure of the Reduced Charge for Which It Will Transport Government Freight, and (2) the Jurisdiction of the District Court Under the Federal Declaratory Judgments Act to Resolve the Controversy Over the Ownership of This Revenue on a Record Which Contains All the Relevant Evidence Which Either Side Could Offer on the Subject.

The equalization agreement between each petitioner and the Government plainly states that petitioner will accord the Government a reduced rate on the condition (R. 1252, 1255, 1259) that it be required to bear only the land grant deductions accruing in Central Territory. We respectfully ask this Court to observe the contradiction and confusion which marks the Court of Appeals' treatment of this condition. The opinion states:

> "These contracts [land grant equalization agreements] are entered into voluntarily by the railroads; and they may, in so far as the government is concerned, contain such conditions, restrictions and limitations as the railroads filing them desire to impose." (R. 1791; 155 F. 2d. 767, 769.)
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> "Clearly, it seems to us, the Agreement read as a whole means that defendants will accept and receive shipments for the government *at the lowest net rates available*, but that for through traffic over connecting lines from or to points outside of Central Freight Association Territory they will divide the revenues only on the territorial basis. The decree makes this *divisional formula* binding upon the plaintiffs who are not parties to it. Thus a contract is imposed upon plaintiffs to which they have not consented." (R. 1798; 155 F. 2d. 767, 772.)

The court's conclusion, it will be seen, is that notwithstanding the plain language of the exception, the petitioners' agreements mean that "defendants [petitioners] will accept and receive shipments for the government *at the lowest net rates available,*" and that the purpose of the exception is to impose a "divisional formula" upon the respondents. The court thus holds, first, that the provision did not operate in the slightest degree to qualify petitioners' holding out to the Government of "the lowest net rates available," and second, that it is ineffective as a "divisional formula," and consequently had no effect whatsoever. The result is that after recognizing, in words, that a non-land grant road may handle land grant traffic upon "such conditions, restrictions and limitations" as it may impose, the court finally concludes that such provisions accomplish nothing because they have no effect upon the rights or duties of the equalizing road, the Government, or connecting lines.

Every equalizing road uses "exceptions" and "conditions" to qualify and define its holding out, and has done so since the beginning of such agreements. The effect of the opinion below is to hold that these provisions are utterly futile and meaningless.

Petitioners' prayer for a determination of this controversy under the Declaratory Judgments Act is met by the Court of Appeals with what seems to us the ironic statement that the parties must agree on the matter in dispute or bring another suit in equity. The action of the District Court in resolving the dispute is vacated because the parties are not in agreement.

We desire to point out that the decision of the Court of Appeals (1) denies petitioners their right under Section 22 of the Interstate Commerce Act to determine the basis on which they will transport Government freight, and (2)

effectively nullifies the purpose of the Declaratory Judgments Act.

Section 22 of the Interstate Commerce Act provides "that nothing in this part shall prevent the carriage or transportation of property free or at reduced rates, for the United States." (49 U. S. C. Sec. 22.)

It cannot be doubted that petitioners have done everything that they can do to fix the measure of the reduced charge for which they are willing to transport land grant traffic. They have never entered into any undertaking or arrangement of any kind with respondents respecting the transportation of this freight or the compensation therefor. Their several agreements are with the Government alone, and provide as clearly as English speech permits, that petitioners will transport this freight upon the condition that they participate only in the deductions plainly identified in their equalization agreements. For the transportation service through Central Territory by petitioners, the Government indisputably pays to the settling road the amount which the public at large would receive for that service (*i. e.*, the commercial rate) reduced only by the stipulated deductions.[1] (R. 1677, 1678.) The respondents, which are the terminating roads on west bound traffic and, therefore, the settling roads, refuse to turn that sum over to petitioners, but reduce it further by applying also a part of the deductions accruing out of land grant mileage in their own (Southwestern) territory. That is the basis of distribution on which respondents are willing to agree. It follows, therefore, that when the Court of Appeals says

[1] Exhibit J, unprinted because of its size, shows by reference to actual shipments, the Government's method of computing the net charge in each rate territory, and the different basis on which the revenue is being distributed by the respondents as the settling roads.

there must be an agreement between the roads, it is holding that petitioners do not have the right to determine the measure of the reduced charge which they will accord the Government under Section 22 of the Interstate Commerce Act, but instead, that they must transport such freight, regardless of the explicit condition on which they undertake the service, for such compensation as the terminating road, which has physical possession of the revenue is willing, in its mercy, to accord. More specifically, in view of the position of respondents, the practical effect of what the Court of Appeals has said (while probably not intended) is that the petitioners may not handle this freight for the Government unless they are willing to bear all the deductions in their own territory and, in addition, a part of the deductions accruing in Southwestern Territory. The only alternative to this result, in the opinion of the Court of Appeals, is for petitioners to permit their claims to accrue and seek to enforce them through multiple suits in equity.

All of the parties to this cause asked for a judgment resolving this controversy, and placed in the record all the evidence they could produce on the subject. We submit that if the Court of Appeals means that the basis for judgment in "a proper suit in equity" must be some evidence *other than the several equalization agreements*,[1] then it is effectively denying to each line the right, through a clear agreement with the Government, to control the measure of the reduced charge which it will accord the Government on land grant traffic.

On the Court of Appeals' theory that the ownership of the sums received by the settling road is not governed by

[1] This appears to be the meaning of the opinion. Notwithstanding the fact that the several equalization agreements are in evidence, the Court states: "No basis for determining a proper division of such past earnings by the parties to this suit is either pleaded or proven in this case."

the equalization agreements, and that the basis for distributing the revenue for the future can be established only by agreement of the several roads, or by the exercise of legislative power, what is to be the basis for judgment in the suggested suit in equity? The Court of Appeals has sustained the District Court in holding that there is no contract between the parties governing the ownership of the revenue, and it does not appear what different or better evidence exists or could be offered in any other proceeding than the compensation which each of the parties has agreed to accept in its individual agreement with the Government. If, as we believe, the suggested suit in equity would have to be determined on the basis of a fair interpretation of the several equalization agreements then, we submit, the Court of Appeals erred in denying the jurisdiction of the District Court to resolve the controversy under the Declaratory Judgments Act, as it did, by interpreting the equalization agreements on the basis of all of the evidence, and decreeing that that interpretation be observed in the settlements.

The Federal Declaratory Judgments Act, Judicial Code, Section 274d, 28 U. S. C. Sec. 400, provides in part as follows:

> "(1) * * * the courts of the United States shall have power * * * to declare rights and other legal relations of any interested party petitioning for such declaration, *whether or not further relief is or could be prayed*, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.
>
> "(2) *Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper* * * *." (Italics supplied.)

In reliance on these provisions of the Act the courts have granted injunctive relief when necessary to resolve the

controversy, and to prevent such a multiplicity of suits as would be required by the opinion below. *United States Galvanizing & Plating Equipment Corporation* v. *Hudson-Van Winkle-Munning Co.*, 104 F. (2d) 856 (C. C. A. 4th, 1939); *National Cosmetologists' Ass'n. Inc.* v. *Philad Co.*, 41 F. Supp. 701 (D. Del., 1941), affirmed in 129 F. (2d) 1020 (C. C. A. 3rd, 1942.)

By forcing the parties to seek a solution of this actual controversy "in a proper suit in equity," or a multiplicity of such suits, the Court of Appeals would defeat the primary purpose of the Declaratory Judgments Act. "The Federal Declaratory Judgment Act is a regulation of procedure providing a new remedy for application in actions at law and suits in equity within the jurisdiction of the federal courts; and there is nothing to suggest that its use is to be confined to cases in which no other adequate remedy is available." (*Stephenson, et al.* v. *Equitable Life Assur. Soc. of the United States*, 92 F. (2d) 406, 409.)

Rule 57 of the Federal Rules of Civil Procedure for the District Courts of the United States provides in part as follows:

> "* * * The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate * * *."

The official Notes to the Rules, prepared by the Advisory Committee appointed by the Supreme Court of the United States, provide in the Note relating to Rule 57:

> "The fact that a declaratory judgment may be granted 'whether or not further relief is or could be prayed' indicates that declaratory relief is alternative or cumulative and not exclusive or extraordinary."

In 3 Moore's *Federal Practice*, page 3204, the following appears:

> "If an action for a declaratory judgment is brought and damages or other affirmative relief may then be had such relief should be claimed; otherwise the plaintiff should be considered as having split his cause of action. As an additional consideration it may be noted that this practice should be enforced, since the purpose of a declaratory judgment is to put an end to a controversy."

We submit that the Court of Appeals erred in denying the power of the District Court to settle this controversy as prayed by both parties, on the basis of the best evidence which both parties were able to adduce on the subject.

Petitioners respectfully ask this Court to review that part of the judgment of the Circuit Court of Appeals which modifies the judgment of the District Court "by eliminating therefrom the declaratory and injunctive relief granted the defendants."

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September 1, 1946.

APPENDIX A.

DEFENDANTS' EXHIBIT D-2 R. 1251-3.

Serving the public since 1827

The Baltimore and Ohio Railroad Company
Office of Vice-President
Freight Traffic and Commercial Development
Baltimore 1, Md.

Golder Shumate
Vice-President

October 12, 1943

Freight Land-Grant Equalization Agreement

United States of America,
Chief of Transportation,
War Department,
Washington, D. C.

SIR:

1. The Baltimore and Ohio Railroad Company (Lines Buffalo, Pittsburgh, Wheeling, Parkersburg, Kenova and West), hereinafter called "this carrier," hereby agrees, subject to the conditions and exceptions stated below, to accept, for the transportation of property shipped for account of the Government of the United States and for which the Government of the United States is lawfully entitled to reduced rates over land-grant roads, the lowest net rates lawfully available, as derived through deductions account of land-grant distance from lawful rates filed with the Interstate Commerce Commission or the various State Commissions applying from point of origin to destination at time of movement.

2. Conditions—

(a) On traffic destined to and/or received from points on lines of other carriers this agreement will apply only in connection with such carriers as have an agreement of the form stated in paragraph 1 above on file with the Chief of Transportation, War Department, Washington, D. C., except as otherwise provided under the heading of "Exceptions" in paragraph 3 below.

(b) On traffic destined to and/or received from points on lines of other carriers this agreement is subject also to the exceptions in the agreements of each individual carrier forming part of the through route of movement, on file with the Chief of Transportation, War Department, Washington, D. C., except as may be otherwise provided under the heading of "Exceptions" in paragraph 3 below.

3. Exceptions—

(a) On traffic moving in connection with Trunk Line and New England Freight Association carriers and/or carriers performing services such as car ferry, floatage, lighterage, and/or switching only, the provisions of Condition (a) of the Agreement, as shown in paragraph 2 above are hereby waived to the extent that any land-grant deductions which are not participated in by any of said carriers by reason of their not having freight land-grant equalization agreements on file with the Chief of Transportation, War Department, Washington, D. C., will be absorbed by agreement carriers participating in the through movement; *Provided*, That each carrier, other than Trunk Line and New England Freight Association carriers and/or carriers performing services such as car ferry, floatage, lighterage, and/or switching only, forming part of through route of movement has a freight land-grant equalization agreement containing this exception on file with the Chief of Transportation, War Department, Washington, D. C.

(b) On traffic moving via all-rail routes this car-

rier will not equalize net rates which are established via rail and water routes. (note: The use of lighterage and/or floatage and/or car ferry service only shall not be construed as rail and water carriage and rate, if and when an otherwise rail rate is employed.)

(c) The participation of this carrier in rates derived through land-grant deductions is subject to the limitation that this carrier will participate only in deductions for the land-grant mileages within Central Freight Association Territory of the lines of railroad in the southern peninsula of Michigan and of the Illinois Central within Illinois between Chicago and Cairo and between Minonk and Centralia, both inclusive.

4. This agreement becomes effective January 1, 1944, and remains in effect during the remainder of the calendar year ending December 31, 1944, and thereafter from year to year unless this carrier files notice of withdrawal or change with the Chief of Transportation, War Department, Washington, D. C., at least sixty days prior to the beginning of any calendar year.

Respectfully submitted,

THE BALTIMORE AND OHIO RAILROAD COMPANY,
(Lines Buffalo, Pittsburgh, Wheeling, Parkersburg, Kenova and West)
By: GOLDER SHUMATE,
Vice President.

Accepted by the United States of America.

By: DARRELL T. LANE,
Office of the Chief of Transportation,
War Department.

Date: 29 December, 1943.

DARRELL T. LANE,
Major, Transportation Corps,
Purchasing and Contracting Officer.

(PLAINTIFFS' EXHIBIT 23—WILSON. R. 347.)

Standard Freight Land-Grant Equalization Agreement.

ST. LOUIS, MISSOURI, May 18, 1939.

The Quartermaster General,
War Department,
Washington, D. C.

SIR:

1. The Missouri Pacific Railroad Company hereinafter called this carrier, hereby agrees, subject to the conditions and exceptions stated below, to accept for the transportation of property shipped for account of the Government of the United States and for which the Government of the United States is lawfully entitled to reduced rates over land-grant roads, the lowest net rates lawfully available, as derived through deductions account of land-grant distance from lawful rates filed with the Interstate Commerce Commission or the various State Commissions applying from point of origin to destination at time of movement.

2. Conditions—

(a) On traffic destined to and/or received from points on lines of other carriers this agreement will only apply in connection with such carriers as have an agreement of the form stated in paragraph 1 above on file with The Quartermaster General, War Department, Washington, D. C., except as otherwise provided under the heading of Exceptions in paragraph 3 below.

(b) On traffic destined to and/or received from points on lines of other carriers this agreement is subject also to the exceptions in the agreements of each individual carrier forming part of the through route of movement, on file with The Quartermaster General, War Department, Washington, D. C., except as may be otherwise provided under the heading of Exceptions in paragraph 3 below.

3. Exceptions—

(a) On traffic moving in connection with Trunk Line and New England Freight Association carriers and/or carriers performing services such as car ferry, floatage, lighterage, and/or switching only, the provisions of Condition (a) in paragraph 2 above are hereby waived to the extent that any land-grant deductions which are not participated in by any of said carriers by reason of their not having freight land-grant equalization agreements on file with The Quartermaster General, War Department, Washington, D. C., will be absorbed by agreement carriers participating in the through movement: Provided, that each carrier, other than Trunk Line and New England Freight Association carriers and/or carriers performing services such as car ferry, floatage, lighterage, and/or switching only, forming part of through route of movement has a freight land-grant equalization agreement containing this exception on file with The Quartermaster General, War Department, Washington, D. C.

(b) On traffic moving in connection with initial line-haul railroads and/or last line-haul railroads, other than those carriers enumerated in Exception (a) who do not have freight land-grant equalization agreements on file with the Quartermaster General, War Department, Washington, D. C., the provisions of Condition (a) in paragraph 2 above are hereby waived with respect to such initial line-haul railroads and/or last line-haul railroads; provided that if other agreement carriers form part of a through route of movement each agreement carrier shall have this exception in its freight land-grant equalization agreement on file with the Quartermaster General, War Department, Washington, D. C.

(c) On traffic moving via all-rail routes this carrier will not equalize net rates which are established via rail and water routes. (Note.—The use of lighterage and/or floatage and/or car ferry service only shall not be construed as rail and water carriage and rate, if and when an otherwise rail rate is employed.)

(d) On traffic moving to, from or through Central Freight Association territory the provisions of Condition (b) in paragraph 2 above are hereby waived to the extent that any restrictive exceptions contained in the agreements of Central Freight Association carriers on file with The Quartermaster General, War Department, Washington, D. C., **shall not operate to restrict equalization to or from junctions with said Central Freight Association carriers.** (Emphasis added.)

4. This agreement becomes effective May 18, 1939 and remains in effect during the remainder of the calendar year ending December 31, 1939, and thereafter from year to year unless this carrier files notice of withdrawal or change with The Quartermaster General, War Department, Washington, D. C., at least sixty days prior to the beginning of any calendar year.

5. This agreement cancels all previous equalization agreements, if any, on freight traffic filed by this carrier.

Respectfully submitted,

MISSOURI PACIFIC RAILROAD COMPANY,
(Name of Carrier)
(Signed) C. H. GUION,
(Authorized Representative)
Freight Traffic Manager.
(Title)

Accepted for The Quartermaster General.
By: (Signed) WILBUR S. ELLIOTT,
WILBUR S. ELLIOTT,
Major, Q. M. Corps, Ass't.

Date: August 3, 1939.

(Executed in triplicate.)

Note:—Three signed copies to be forwarded to The Quartermaster General, one of which will be returned to the carrier upon acceptance.